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No. 86—

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOUTHLAND ROYALTY COMPANY,
Petitioner,

v.

JICARILLA APACHE TRIBE AND
DONALD P. HODEL, SECRETARY OF THE INTERIOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN R. COONEY
(Counsel of Record)
LYNN H. SLADE
WALTER E. STERN III
MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.
Post Office Box 2168
Suite 1000, Sunwest Building
500 Fourth Street, NW
Albuquerque, New Mexico 87103
(505) 848-1800
Attorneys for Petitioner
Southland Royalty Company

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a concededly reasonable Interior Department interpretation of regulations and tribal oil and gas leases may be set aside and a different interpretation compelled solely because the other interpretation may produce greater immediate benefit for the lessor tribe.

2. Whether a reasonable and long-standing Interior Department interpretation of regulations and lease terms is entitled to judicial deference even though a different interpretation might further particular tribal interests.

3. Whether lessees relying without fault and in good faith upon the Secretary of the Interior's long-standing and reasonable interpretation of tribal oil and gas leases and regulations may be held liable for additional royalties when the Secretary's administrative interpretation subsequently is determined to have breached his fiduciary duties to an Indian tribe.

LIST OF PARTIES

In addition to those parties included in the caption to this Petition, the other parties to this action are Exxon Corporation, Southern Union Company, and Supron Energy Corporation (now Unicon Producing Company). The State of New Mexico unsuccessfully sought intervention below. The Shoshone and Arapahoe Tribes and Conoco, Inc. appeared as *amici curiae* before the Court of Appeals for the Tenth Circuit.

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATED COMPANIES

Southland Royalty Company, a Delaware corporation, is a wholly-owned subsidiary of Burlington Northern Inc., a Delaware corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATED COMPANIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY AND REGULATORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
I. THE COURT OF APPEALS' INVALIDATION OF A REASONABLE ADMINISTRATIVE INTERPRETATION OF LEASE TERMS AND REGULATIONS SOLELY BECAUSE ANOTHER INTERPRETATION MIGHT PRODUCE GREATER TRIBAL REVENUE CONFLICTS WITH DECISIONS OF THIS COURT	9
A. The Court of Appeals' Conclusion that APA Standards do not Govern Suits to Set Aside Agency Actions Respecting Leases of Trust Property Conflicts With Decisions of this Court	11
B. The Court of Appeals' Conclusion that the Secretary has a Duty to Maximize Royalty Revenue Conflicts with *Mitchell II* and the IMLA	13

TABLE OF CONTENTS—Continued

Page

C. The Decision Below Conflicts with Decisions of this Court and the Claims Court Defining Federal Trust Duties to Contemplate the Exercise of Discretion and a Standard of Ordinary Care 16

II. THE COURT OF APPEALS' INVALIDATION OF A REASONABLE AND LONG-STANDING ADMINISTRATIVE INTERPRETATION CONFLICTS WITH CANONS OF CONSTRUCTION PRESCRIBED BY THIS COURT 18

A. The Decision Below Conflicts with this Court's Decisions Requiring Deference to Reasonable, Long-Standing Interior Department Interpretations of Regulations 20

B. The Decision Below Conflicts with this Court's Decisions Favoring Interpretations that Give Effect to all Provisions of Applicable Law 24

III. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT THAT HOLD THE TRUSTEE, NOT INNOCENT THIRD PARTIES, LIABLE FOR BREACHES OF TRUST 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES Page

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 27
American Indians Residing on the Maricopa-Ak Chin Reservation v. United States, 667 F.2d 980 (Ct. Cl. 1981), *cert. denied*, 456 U.S. 989 (1982) 18
Amoco Production Co., 29 I.B.L.A. 234 (1977) 24
Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953) 27
Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 20, 23
Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc., 419 U.S. 281 (1974) 12
California v. Southland Royalty Co., 436 U.S. 519 (1978) 14
California Co. v. Udall, 296 F.2d 384 (D.C. Cir. 1961) 15
Chemehuevi Tribe of Indians v. F.P.C., 420 U.S. 395 (1975) 13, 23
Coast Indian Community v. United States, 550 F.2d 639 (Ct. Cl. 1977) 18
Colautti v. Franklin, 439 U.S. 379 (1979) 27
Daniels v. United States, 247 F. Supp. 193 (W.D. Okla. 1965) 13
Danks v. Fields, 696 F.2d 572 (8th Cir. 1982) 13
Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206 (1827) 23
Escondido Mutual Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands, 466 U.S. 765 (1984) 12
Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980) 23
F.P.C. v. Texaco, Inc., 417 U.S. 380 (1974) 14
F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99 (1960) 12
Hoover & Bracken Energies, Inc., 52 I.B.L.A. 27 (1981) 24
International State Bank v. Bray, 87 N.M. 350, 533 P.2d 583 (1975) 29

TABLE OF AUTHORITIES—Continued

Page

Jay v. Boyd, 351 U.S. 345 (1956) 27
Jicarilla Apache Tribe v. Conoco, Inc., Civ. No. 76-430 (D.N.M.) 11
Mitchell v. United States, 664 F.2d 265 (Ct. Cl. 1981), *aff'd*, 463 U.S. 206 (1983) 13, 17
Montana v. Blackfeet Tribe of Indians, 105 S. Ct. 2399 (1985) 15
Montana v. Blackfeet Tribe of Indians, 729 F.2d 1192 (9th Cir. 1984) (*en banc*) 15
Moose v. United States, 674 F.2d 1277 (9th Cir. 1982) 18
Morton v. Ruiz, 415 U.S. 199 (1974) 12, 13
Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana, 105 S. Ct. 2587 (1985) 22, 23, 24, 27
Navajo Tribe v. United States, 9 Cl. Ct. 227 (1985) 18
Nevada v. United States, 463 U.S. 110 (1983) 28
Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976) 23
North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980) 13, 14
Seminole Nation v. United States, 316 U.S. 286 (1942) 28
Supron Energy Corporation, 46 I.B.L.A. 181 (1980) 7, 21, 25
Tooahnippah v. Hickel, 397 U.S. 598 (1970) 13
Udall v. Tallman, 380 U.S. 1 (1965) 20, 22, 23
United States v. Mason, 412 U.S. 391 (1973) 17
United States v. Mitchell, 445 U.S. 535 (1980) 17
United States v. Mitchell, 463 U.S. 206 (1983) .... *passim*
Voss Oil Co. v. Voss, 367 P.2d 977 (Wyo.(1962) 29

FEDERAL STATUTES AND REGULATIONS

Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1982) ..... *passim*
Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, 4 (1982) 2, 8
Clayton Act, 15 U.S.C. §§ 15, 19 (1982) 2, 8

TABLE OF AUTHORITIES—Continued

	Page
Natural Gas Act, 15 U.S.C. §§ 717-717w (1982)	14
Indian Mineral Leasing Act of May 11, 1938, ch. 198, 52 Stat. 347, 25 U.S.C. §§ 396a-396g (1982)	*passim*
25 U.S.C. § 396 (1982)	19
25 U.S.C. § 398 (1982)	19
25 U.S.C. §§ 398a-398e (1982)	19
Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 461-479 (1982)	3
28 U.S.C. §§ 1254(1) (1982)	3
28 U.S.C. § 1331 (1982)	2
28 U.S.C. § 1332 (1982)	2
28 U.S.C. § 1362 (1982)	2
28 U.S.C. § 1491 (1982) ("Tucker Act")	12, 28
Mineral Leasing Act of 1920, 30 U.S.C. §§ 223-237 (1982)	19
Pueblo Lands Act, Act of June 17, 1924, ch. 331, 43 Stat. 636	23
30 U.S.C. §§ 351-359 (1982)	19
25 C.F.R. § 171.13 (1981)	16, 25, 26
25 C.F.R. §§ 211.1-211.30 (1986)	*passim*
30 C.F.R. §§ 206.100-206.107 (1985)	*passim*
30 C.F.R. § 221.47 (1982)	16, 24, 25
30 C.F.R. § 221.50 (1982)	16, 26, 27
7 Fed. Reg. 4,132 (June 2, 1942)	6, 20
22 Fed. Reg. 10,588 (December 24, 1957)	20
42 Fed. Reg. 22,610 (May 4, 1977)	21
42 Fed. Reg. 40,263 (August 9, 1977)	21
51 Fed. Reg. 260 (January 3, 1986)	21, 24
51 Fed. Reg. 4,507 (February 5, 1986)	22

LEGISLATIVE HISTORY

S. Rep. No. 752, 79th Cong., 1st Sess. (1945)	13
H.R. Rep. No. 97-746, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 3465	15
H.R. Rep. No. 1872, 75th Cong., 3d Sess. (1938)	15

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page
G. Bogert, *Law of Trusts and Trustees* (2d ed. 1965)	28
Department of the Interior, *Mineral Revenues, Report on Receipts from Federal and Indian Leases* (1983)	11
Restatement (Second) of Trusts (1959)	28
B. Schwartz, *Administrative Law* (1976)	12
A. Scott, *The Law of Trusts* (2d ed. 1956)	29
A. Scott, *Law of Trusts* (3d ed. 1967)	28

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Southland Royalty Company (Southland Royalty Company and its predecessor in interest, Aztec Oil & Gas Co., will collectively be referred to as "Southland") respectfully prays that a Writ of Certiorari issue to review the *en banc* judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on January 23, 1986, and reported at 782 F.2d 855.

OPINIONS BELOW

The opinion of the *en banc* Court of Appeals for the Tenth Circuit is reported at 782 F.2d 855, and is reprinted in the Joint Appendix filed concurrently on behalf of Petitioners Supron Energy Corporation (now Unicon Producing Company) ("Supron"), Exxon Corporation ("Exxon"), Southern Union Company ("Southern Union"), and Southland ("J.App."), 1a-14a.[1] A supplement to the *en banc* opinion was issued on June 18, 1986. J.App.

[1] Supron, Exxon, and Southern Union are filing separate petitions for certiorari arising from the decision below.

18a-20a. The panel opinion of the Court of Appeals for the Tenth Circuit is reported at 728 F.2d 1555, and is reprinted at J.App. 21a-65a.[2] The published opinion of the United States District Court for the District of New Mexico is reported at 479 F. Supp. 536, and is reprinted at J.App. 104a-137a. The District Court also issued other Opinions and Orders as follows: (a) Memorandum Opinion and Order dated September 7, 1978, granting Defendants' Motion for Partial Summary Judgment, J.App. 66a-74a; (b) Memorandum Opinion and Order dated December 19, 1978, denying the Tribe's Motion to Revise and reaffirming entry of Partial Summary Judgment, J.App. 75a-78a; and (c) July 30, 1980, January 26, 1981, and June 1, 1981 Orders concerning, *inter alia*, calculation of royalties owing the Jicarilla Apache Tribe pursuant to the District Court's ruling, *see* J.App. 141a-153a; 154a-164a; 173a-174a.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1331, 1332 and 1362 (1982), 5 U.S.C. §§ 701-706 (1982), and 15 U.S.C. §§ 1, 2, 4, 15, and 19 (1982), Respondent Jicarilla Apache Tribe ("Tribe") brought this suit in the District of New Mexico against the Secretary of the Interior ("Secretary"), Southland, Exxon, Southern Union, and Supron. After trial and following entry of interim orders and opinions, United States District Judge Edwin L. Mechem entered final judgment on June 1, 1981. Notices of appeal and cross-appeal were filed timely on July 27, 29, 30, 31 and August 7, 1981.

On February 24, 1984, a panel of the Court of Appeals for the Tenth Circuit affirmed in part and reversed in part. On the Tribe's Petition for Rehearing, on January 26, 1986, the Court of Appeals for the Tenth Circuit sitting *en banc* reversed in part the decision of the Tenth

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[2] The *en banc* opinion adopts portions of the opinion of Judge Seymour, concurring in part and dissenting in part in the decision of the Tenth Circuit panel. *See* J.App. 3a. Judge Seymour's opinion is reported at 728 F.2d at 1563, and is reprinted at J.App. 36a.

Circuit panel and remanded to the District Court. Timely Petitions for Rehearing were denied by the Court of Appeals for the Tenth Circuit on April 15, 1986. The Secretary's Application for Modification of the *en banc* opinion was denied on June 18, 1986. The June 18, 1986 order also supplemented the Tenth Circuit's *en banc* opinion. On July 2, 1986, the Honorable Byron R. White granted Southland an extension of time to and including August 13, 1986, in which to file this petition.

The jurisdiction of this Court to review the judgment of the Court of Appeals for the Tenth Circuit is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Indian Mineral Leasing Act of May 11, 1938, ch. 198, 52 Stat. 347, 25 U.S.C. §§ 396a-396g (1982) ("IMLA"). The full text of the IMLA is reproduced at J.App. 200a-203a.

25 C.F.R. Part 211 (1986), *formerly compiled at* 25 C.F.R. Part 171 (1981), reproduced at J.App. 214a-237a.

30 C.F.R. Part 206 (1985), *formerly compiled at* 30 C.F.R. Part 221 (1982), reproduced at J.App. 283a-290a.

STATEMENT OF THE CASE

Southland owns oil and gas leases on lands of the Jicarilla Apache Tribe, an Indian tribe organized and incorporated pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 461-479 (1982). Those leases are memorialized on Standard Form 5-157 prepared initially by the Bureau of Indian Affairs ("BIA") in 1938, the same lease form used for substantially all BIA-approved leases of tribal lands since that time. *See infra* n.5. Southland's oil and gas leases at issue in this action were approved by the Secretary and are administered pursuant to the IMLA and its implementing regulations. *See* 25 U.S.C. §§ 396a-396g (1982); 25 C.F.R. Part 171 (1981), *presently compiled at* 25 C.F.R. Part

211 (1986), and 30 C.F.R. Part 221 (1982), *presently compiled at* 30 C.F.R. Part 206 (1986); J. App. 107a-108a.

Southland's leases primarily produce natural gas which contains small quantities of "liquid" byproducts; the proper calculation of royalty for gas containing "liquids" is at issue here.[3] Southland sells its gas "at the wellhead," before the gas is transported by pipeline to a gas processing plant located off the Tribe's Reservation, where liquids are extracted.[4] Gas purchase contracts that the District Court found to be "typical," "arms-length," and "fair and reasonable to all parties" determine the price paid at the wellhead. J. App. 113a, 114a. A "favored nation" clause in the gas purchase contract assures Southland of receiving a price no lower than that its buyer pays any other producer in the area. *Id.* at 113a n.3. Each of Southland's leases requires that the lessee pay royalty of twelve and one-half percent of the value or amount of oil and gas produced and sold from the leased lands. Since first production from these leases, Southland and other lessees have accounted for and paid royalty based on a "value" equal to the actual amount realized from purchasers under their gas purchase contracts.

In this action, the Tribe claims, *inter alia*, that Southland and other lessees failed to account for and pay royal-

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[3] The natural gas stream at the wellhead commonly is referred to as "wet" gas and consists of several constituents, including ethane and methane. The heavier constituents, propane, butane, and natural gasoline, are called natural gas "liquids." "Wet" gas often is routed through a gas processing plant to extract those "liquids" from the natural gas stream before pipeline transportation. The extracted liquids then may be sold as separate fuels. *See* J.App. 45a n.4.

[4] Gas produced from Southland's leases on the Jicarilla Reservation is processed at a liquids extraction plant at Lybrook, New Mexico, located off the Jicarilla Reservation, 15 to 40 miles downstream from the wellheads at which Southland sells the "wet" gas. Joint Appendix before the Court of Appeals for the Tenth Circuit ("A ——"), A-842. Southland has neither owned nor operated the Lybrook extraction plant nor derived any revenue from the plant. A-516-17, 565.

ties correctly, failed to develop diligently the leases, and violated the federal antitrust laws. A-131. The Tribe's royalty accounting claims, the subject of this Petition, request the court to compel the Secretary to require "dual accounting" of gas royalties from all oil and gas lessees on the reservation, to declare that Southland and other lessees have breached their leases by failing to dual account, and to award money damages against lessees. Second Amended Complaint, 9-14, A-126-132. Royalty payments, according to the Tribe, should be based on the higher of the values derived under two, "dual", accounting methods, the "BTU adjustment" method which the Secretary employed "[a]t the time this litigation began," J.App. 42a, and a "net realization" method that the Tribe seeks to require in addition.

Under the "BTU adjustment" method, embodied in Southland's gas purchase contracts, the price received by Southland, upon which the royalty to the Tribe is based, includes an adjustment for the liquid content of the gas. The heating value of the gas (its "BTU content") is measured at the wellhead. Because the BTU content of "liquids" generally is higher than the "dry" components of the gas, the BTU adjustment for liquid content thus results in greater royalty compensation to the Tribe. Accordingly, "value" for royalty purposes using the BTU adjustment provides compensation to the Tribe for the "liquid" content of the gas stream. A-451-53, A-931.

The "net realization" method requires tracing the gas to the downstream processing plant to roughly approximate the net revenue the plant operator derives from subsequent liquids processing. The method requires calculation of the total revenue the processing plant derives from each constituent of the "wet" gas stream from all leases that feed the plant, and establishing and deducting from total revenue a processing allowance to reflect the processor's plant operating costs. The method then attributes a share of this "net realization," or net revenue of the processing plant from all liquids processing back

to each lease that feeds the plant, including in this action off-reservation leases. This calculation requires use of plant owners' proprietary information that usually is not available to non-plant-owning lessees.

Southland's leases (and substantially all other tribal and allotted oil and gas leases made since 1939) contain the following provision defining the lessee's royalty payment obligation:

> To pay . . . a royalty of twelve and one-half percent of the value or amount of all oil, gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein . . .
>
> * * * *
>
> The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary, be deemed mere evidence of or conclusive evidence of such value. . . .

Bureau of Indian Affairs, Standard Form 5-157 Lease (June 1939): Oil and Gas Mining Lease—Tribal Indian Lands ("Lease"), ¶ 3(c), A-943-44, reprinted at J.App. 379a-381a.[5] This provision is nearly identical to applicable BIA regulations, *see* 25 C.F.R. §§ 211.14-211.15 (1986) and is consistent with the regulations governing calculation and payment of royalties applicable to tribal, allotted, and federal leases, that have remained unchanged since 1942. *Compare* 7 Fed. Reg. 4,132-4,141 (June 2, 1942) *with* 30 C.F.R. §§ 206.100-206.107 (1985).

Prior to entry of the District Court's decision below, the Secretary consistently had interpreted the Lease provisions and applicable regulations as permitting "value" of gas for royalty purposes to be determined based on the actual revenue realized by the lessee, *see* A-513-14, which, at the time of trial, included compensation for

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[5] BIA's Form 5-154 leases, for leases of individually owned, allotted lands contains a royalty provision that is identical in all material respects.

liquids in the wet gas based on a BTU adjustment. *See* A-1650-51. Since the inception of its leases, Southland and its precedessor accounted for and paid royalty each month based on the "value" of the "wet" gas measured by the actual revenues Southland received under arms-length gas purchase contracts at the wellhead, the point of sale. Prior to this action, the Secretary had issued to Southland statements of account based on Southland's reporting, with one exception, *see infra* n.7; the Secretary had imposed "dual accounting" only on Supron, and then only for the period during which Supron owned and operated the Lybrook gas processing plant and derived revenue from the sale of liquid products from the plant. *See* A-476-77.[6]

Considering both lease terms and the administrative record, the District Court entered partial summary judgment in favor of Southland and other lessees on September 7, 1978, rejecting the Tribe's royalty accounting

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[6] Prior to filing this action, the Tribe demanded that the Secretary assess additional royalties from Southland and others reflecting the true value of gas produced "from 1953 to date". *See* A-143-148. In response, the Area Supervisor of the United States Geological Survey ("USGS") notified Southland that it was being assessed additional royalties because some royalties had been paid based upon values below a minimum value then established by the USGS based on the highest price paid in the field or area. *See* A-127-28; Lease, ¶ 3(c). At the same time, the Area Supervisor ordered Supron to implement dual accounting for royalties for the period 1974-76, when Supron owned and operated the Lybrook processing plant. A-128. The Area Supervisor's 1976 order regarding Southland declined to require dual accounting. *Id.* Southland and Supron, together with other lessees, appealed these orders on separate grounds ultimately to the Interior Board of Land Appeals ("IBLA"), which affirmed by a decision entered after entry of the judgment below. *Supron Energy Corp.*, 46 I.B.L.A. 181, 184, 194 (1980). Subsequently, on July 20, 1981, an Acting Associate Solicitor of Interior concluded, in reliance on the District Court's opinion here, that the Secretary had discretion to require dual accounting by all lessees. Like the IBLA decision, the Acting Associate Solicitor's opinion does not form any part of the record upon which the District Court's decision was based.

claims. J.App. 66a-69a, 74a. Thereafter, a non-jury trial was held on the remaining issues raised by the Tribe's Second Amended Complaint.[7] *See, e.g.*, A-470.

The District Court entered a Memorandum Opinion and Order on November 5, 1979, finding in favor of the Secretary, Southland, and other lessees on all issues fully heard at trial. However, the District Court *sua sponte* reversed its summary judgment rulings. The District Court concluded that lease terms and federal regulations required lessees to compute and pay royalties based on "dual accounting," and that by accounting for and paying royalties based on the amount realized, Southland and other lessees had breached their leases, but through "no apparent fault of their own." J.App. 127a. The District Court further ruled, without evidence in the record that dual accounting would result in greater royalty payments, that the Secretary breached his fiduciary duty to the Tribe in failing to require Southland and other lessees to account for royalties using the "dual accounting" method. J.App. 127a-135a. According to the District Court, the Secretary's fiduciary duty "necessarily circumscribes the discretion granted him by the lease terms [and regulations] should it be determined that the two are in conflict." J.App. 125a.

Over a dissent by Judge Seymour, the Tenth Circuit panel affirmed the District Court's ruling rejecting the Tribe's antitrust and diligent development claims, but reversed the lower court on the "dual accounting" issue, recognizing that

> [f]rom 1950 to 1979 without exception, and without variation, the Secretary and the USGS had construed the lease provisions and the regulations to require dual accounting not by all lessees, but *only* in instances where the lessee owned the processing plant (or received added money for its products).

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[7] Those issues involved claims arising under the Sherman Antitrust Act and the Clayton Act, 15 U.S.C. §§ 1, 2, 4, 15, and 19 (1982), and concerning diligent development of the leases.

J.App. 24a (emphasis in original). Judge Seth's panel decision concluded that, because the Secretary's construction of his own regulations and leases was reasonable, and was not arbitrary or capricious, it was within his discretion to adopt and apply it. J.App. 28a-30a.

On Petition for Rehearing, the Tenth Circuit sitting *en banc*, in a sharply divided 4-3 decision, reversed the panel decision and affirmed the District Court decision on the "dual accounting" issue, adopting Judge Seymour's dissent from the panel decision as the decision of the *en banc* court. Consequently, the majority concluded that the Secretary had breached his fiduciary duty to the Tribe in failing to require "dual accounting" of all lessees. J.App. 41a-48a.

After Petitions for Rehearing were denied, the court supplemented its *en banc* decision in its June 18, 1986 opinion, denying the Secretary's Application for Modification of the *en banc* opinion, concluding, on the one hand, that the "Secretary failed in its duty to represent the Tribe's interests . . .," and, on the other, that lessees, rather than the Secretary, are liable for additional royalties. J.App. 19a. This Petition requests review of the opinion of the Court of Appeals for the Tenth Circuit sitting *en banc*.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' INVALIDATION OF A REASONABLE ADMINISTRATIVE INTERPRETATION OF LEASE TERMS AND REGULATIONS SOLELY BECAUSE ANOTHER INTERPRETATION MIGHT PRODUCE GREATER TRIBAL REVENUE CONFLICTS WITH DECISIONS OF THIS COURT.

The Court of Appeals' decision cannot be reconciled with this Court's decisions governing suits to set aside agency actions affecting Indians. In this action filed under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1982) ("APA"), the District Court rendered a declaratory judgment that the Secretary breached his fi-

duciary duty to the Tribe by not requiring dual accounting and ordered the Secretary to require lessees to render accountings by the dual accounting method. J.App. 135a, 139a. These rulings, consequently, set aside longstanding agency actions, *see infra* Point II, and compelled agency action allegedly wrongfully withheld; however, neither the District Court nor the Court of Appeals found the Secretary's acceptance of royalty measured by the amount received by the lessee to have been "arbitrary, capricious, or not in accordance with law . . .," as specifically required by APA § 10(e), 5 U.S.C. § 706(2)(A). That holding conflicts with the plain language of the APA and with decisions of this Court strictly construing the APA. *See infra* Point I.A.

The premise of the courts below, that Secretarial actions affecting property concerning which the Interior Department allegedly has trust duties "must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary . . .," J.App. 36a, disregards two principles reflected in this Court's cases. First, judicial review of suits to set aside or compel administrative actions respecting trust property are governed by traditional administrative law standards and the APA. Second, even if "breach of trust" standards developed under statutes authorizing suits for money damages against the United States were applicable to APA actions, the standard of review indicated by the IMLA and applied in breach of trust cases is comparable to that reflected in the APA and recognizes Secretarial discretion. The attempts of the decisions below to divest administrative actions affecting property rights of tribal lessees of the attributes of certainty, stability, and continuity that administrative law principles give to all federal administrative actions conflict with the decisions of this Court and the APA; certiorari should be granted to address that conflict.[8]

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[8] The Tribe agreed below that the issues presented by this case "are of exceptional nationwide importance. The majority [panel]

A. The Court of Appeals' Conclusion that APA Standards do not Govern Suits to Set Aside Agency Actions Respecting Leases of Trust Property Conflicts With Decisions of this Court.

The Court of Appeals' formulation of a standard of judicial review that would supplant statutory prerequisites to relief under the APA presents important questions concerning judicial review of agency action affecting Indian tribes. Both decisions below assert the power in an APA action to set aside agency action and to compel agency action withheld without regard to whether the administrative action is found to be "arbitrary, capricious, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1982). *See* J.App. 48a.[9] If undisturbed, the test fashioned by the Tenth Circuit would require that, even if the Secretary's interpretation of lease terms and regulations is reasonable, as it is conceded to be here, it must be set aside whenever a tribe can formulate a different interpretation that may yield greater benefits to the lessor tribe:

> When the Secretary is acting in his fiduciary role rather than solely as a regulator and is faced with a decision for which there is more than one "reasonable" choice as that term is used in administrative law, he must choose the alternative that is in the best interests of the Indian tribe.

J.App. 44a; *see also* J.App. 45a. This unprecedentedly stringent standard of judicial review of agency action conflicts with this Court's decisions interpreting the APA

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decision directly and adversely affects over 2,000 Indian oil and gas leases covering over two million acres of Indian lands . . . for 33 tribes. Thousands of individual Indian allottees are likewise affected." Tribe's Reply Brief on Rehearing, 3, *citing* Department of the Interior, *Mineral Revenues, Report on Receipts from Federal and Indian Leases* (1983). *See, e.g., Jicarilla Apache Tribe v. Conoco, Inc.*, Civ. No. 76-430 (D.N.M.) (a further action by the Tribe seeking imposition of dual accounting on additional leases stayed pending resolution of this action); *cf.* Brief of Amici Shoshone and Arapahoe Indian Tribes at 1, 30-40, *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855 (10th Cir. 1986).

and mandating that the agency decision be upheld under the "arbitrary and capricious" test if the decision has "a rational basis." *Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 290 (1974).

The review below was required to conform to statutory APA standards. General statutes, such as the APA, applicable to all situations or persons equally, are applicable to matters affecting Indians and tribes. *See, e.g., Escondido Mutual Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands*, 466 U.S. 765, 786 (1984); *F.P.C. v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). Obviously recognizing these principles, the Tribe's Second Amended Complaint specifically invoked APA jurisdiction and alleged that the Secretary's failure to require dual accounting was "arbitrary, capricious, and not in accordance with law." A-131.[9]

Decisions of this Court and other circuits reviewing agency action affecting Indian tribes under traditional APA administrative law principles clearly establish the propriety of review here under APA standards. The decision below erroneously relies upon *Morton v. Ruiz*, 415 U.S. 199, 236 (1974), for the proposition that this Court "has implicitly recognized that stricter standards apply to federal agencies when administering Indian programs." J.App. 44a. To the contrary, although *Morton* acknowledged that the federal government must "deal fairly" with Indians, it applied traditional administrative law principles to review agency action concerning Indian welfare assistance benefits. 415 U.S. at 236, 237. *Morton* has been so interpreted. *See* B. Schwartz, *Administrative Law* 180 n.193 (1976). The APA, the *Morton* Court noted, was intended to promote reasonable and fair decisions by all agencies affecting "individual rights and obliga-

[9] The *en banc* majority's extensive reliance on *United States v. Mitchell*, 463 U.S. 206 (1983), does not supply an alternative basis for review. *Mitchell* was filed under the Tucker Act, 28 U.S.C. § 1491 (1982), allowing suits for damages against the United States.

tions . . .," presumably including tribal oil and gas lessees. 415 U.S. at 232, *citing* S. Rep. No. 752, 79th Cong., 1st Sess. 12-13 (1945). *See also Chemehuevi Tribe of Indians v. F.P.C.*, 420 U.S. 395, 409 (1975); *Tooahnippah v. Hickel*, 397 U.S. 598, 605-06, 609 (1970).

Courts have specifically applied APA standards to actions affecting trust property: "Generally, a BIA decision to increase grazing permit fees cannot be set aside unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Danks v. Fields*, 696 F.2d 572, 575 (8th Cir. 1982); *cf. Mitchell v. United States*, 664 F.2d 265, 274 (Ct. Cl. 1981), *aff'd*, 463 U.S. 206 (1983); *see also Daniels v. United States*, 247 F. Supp. 193, 194 (W.D. Okla. 1965) (decision of the Secretary denying an allotment application subject to judicial review under the APA). The court below erred in engrafting breach of trust standards onto statutory administrative law principles governing judicial review of agency action.

B. The Court of Appeals' Conclusion that the Secretary has a Duty to Maximize Royalty Revenue Conflicts with *Mitchell II* and the IMLA.

The decision below conflicts with the decision in *United States v. Mitchell*, 463 U.S. 206 (1983) (*"Mitchell II"*), prescribing how trust duties to Indians must be defined. Under *Mitchell II*, the IMLA and its implementing regulations "define the contours of the United States' fiduciary responsibilities." 463 U.S. at 224. The IMLA and its regulations refute the Tenth Circuit's conclusion that the Secretary is obligated to "maximize" royalty revenues for Indian tribes. Rather, those provisions charge the Secretary to exercise ordinary prudence and discretion in the management of tribal resources.[10]

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[10] Trust duties do not preclude the Secretary from considering national resource development and energy policy. *See North Slope*

The IMLA does not support the Tenth Circuit's conclusion that the Secretary must "maximize" tribal royalties. The only statutory language arguably defining the standard of care applicable to administrative actions under the Act is contained in § 2 of the IMLA, 25 U.S.C. § 396b: The Secretary has the right to reject bids received in a lease sale "whenever *in his judgment* the interest of the Indians will be served . . ." and if no "satisfactory bid is received . . ." (emphasis added), or if the Secretary "shall determine it is unwise in the interest of the Indians . . ." to accept bids. Other IMLA provisions only vest discretion in the Secretary. IMLA § 4, 25 U.S.C. § 396d, subjects all operations under any lease to "the rules and regulations promulgated by the Secretary . . .", and IMLA § 5, 25 U.S.C. § 396e, allows the Secretary, "in his discretion," to authorize approval of leases. These provisions cannot support an unprecedented requirement that the Secretary "maximize" tribal revenues.

Contrary to the Tenth Circuit's reading, the IMLA and its legislative history do not restrict the Secretary's discretion or subject him to stricter than traditional fiduciary standards. *See infra* Point I.C. The IMLA does not reflect a purpose to require the Secretary to "maxi-

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Borough v. Andrus, 642 F.2d 589, 613 (D.C. Cir. 1980), recognizing that the Secretary's duties involve a balancing of tribal interests and "other public concerns": "Discretion . . . is given to the Secretary to make responsible decisions which balance the public and social interests involved. . . . [A] veto for any one particular set of interests . . . would halt the Secretary's delegated decision-making." *Id.* This action affects national interests embodied in the Natural Gas Act, 15 U.S.C. §§ 717-717w (1982), which was designed to "assure an adequate and reliable supply of gas at reasonable prices," *California v. Southland Royalty Co.*, 436 U.S. 519, 523 (1978), and to encourage "the exploration for and development of new sources of natural gas," *F.P.C. v. Texaco Inc.*, 417 U.S. 380, 388 (1974).

mize" royalty revenue or to invalidate actions not meeting that standard.[11] The Tenth Circuit purportedly based its standard of "*maximum* benefit," J.App. 48a (emphasis in original), on a review of activities the IMLA charges the Secretary to perform, and not on statutory provisions prescribing a standard of care. J.App. 40a. The *en banc* majority asserted that its interpretation was bolstered by a single sentence of a letter from an Acting Secretary of the Interior to Congress recommending passage of the IMLA, saying "it is not believed the present law is adequate to give the Indians the greatest return from their property . . .," and appearing in a paragraph advocating only the elimination of artificial barriers to tribal leasing. *See* H.R. Rep. No. 1872, 75th Cong., 3d Sess. 2 (1938). This single phrase, language not appearing in the text of the statute, does not call for consideration of short-term revenue maximization alone, but rather reflects an intention that the IMLA rectify a statutory scheme that resulted in "long delay and . . . expense to an applicant for a lease . . . and consequently the opportunity to lease the land is lost." *Id.*[12] The decision below, by mandating additional accounting expense and unsettling rights of lessees of tribal lands, threatens to undermine the major purpose of the IMLA of enhancing the economic viability of oil and gas leasing of tribal lands.[13]

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[11] In discussing an Indian Mineral Development bill in 1982, the House Committee on Interior and Insular Affairs stated, after express reference to the IMLA, that existing law shields the Secretary from any liability when he "acts responsibly and within his discretion. . .". H.R. Rep. No. 97-746, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 3465, 3469-70.

[12] *See also Montana v. Blackfeet Tribe of Indians*, 105 S. Ct. 2399, 2404 n.5 (1985), *quoting Montana v. Blackfeet Tribe of Indians*, 729 F.2d 1192, 1198-99 (9th Cir. 1984) (en banc).

[13] *Cf. California Co. v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961) (The Secretary's "duties have another aspect. The public does not

The Tenth Circuit erred in defining the Secretary's trust duty in a manner that would negate regulations and consistent lease terms that, according to *Mitchell II*, authoritatively define the Secretary's trust duties. *See* 463 U.S. at 224. The IMLA regulations vest in the Secretary discretion to administer tribal oil and gas leases in the manner invalidated below. *See, e.g.*, 25 C.F.R. § 171.13 (1981); 30 C.F.R. § 221.47 (1982). The court below misconstrued *Mitchell II* by writing out of the IMLA and its regulations, under the guise of the breach of trust doctrine, unambiguous language expressly granting the Secretary discretion to determine value for royalty purposes. *See* 25 C.F.R. § 171.13 (1981); 30 C.F.R. § 221.50(b) (1982).

The consequences of requiring dual accounting may be to dampen interest in leasing tribal lands for future oil and gas development as compared, for example, to federal lands where dual accounting is not required, a perverse consequence to flow from interpretation of a trust duty. Accordingly, the myopic view of the decision below conflicts with the major purposes of the IMLA and impermissibly restricts the Secretary's discretion to administer tribal oil and gas leases in a prudent and reasonable manner.

C. The Decision Below Conflicts with Decisions of this Court and the Claims Court Defining Federal Trust Duties to Contemplate the Exercise of Discretion and a Standard of Ordinary Care.

The decision below, restricting Secretarial administration of oil and gas leases to furtherance of a single goal of maximizing short term royalties, disregards that trust law principles, statutes, and regulations obligate the Sec-

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benefit from resources that remain undeveloped, and the Secretary must administer the Act so as to provide some incentive for development.")

retary to exercise reasonable, independent judgment and discretion in managing natural resources on Indian reservations. As Justice Marshall's opinion for this Court in *United States v. Mason*, 412 U.S. 391, 398 (1973), recognized, based on readily ascertainable common law principles, the United States' duty in administering the trust is to exercise the care and skill that "a man of ordinary prudence would exercise in dealing with his own property." *Mason* further holds that if the trust property is "diminished in value, the trustee is not [liable] unless he failed to exercise the required care and skill." 412 U.S. at 398. The decision below conflicts with these principles because it finds a breach of trust without finding that the trustee failed to act with ordinary care.

This principle is reflected in the Claims Court decision following the remand in *United States v. Mitchell*, 445 U.S. 535 (1980), and affirmed in *Mitchell II*. *Mitchell v. United States*, 664 F.2d 265, 274 (Ct. Cl. 1981), *aff'd*, 463 U.S. 206 (1983), holds that the "standard by which Interior's actions are to be judicially tested" to ascertain whether it breached trust duties "is not the court's or plaintiff's own view of the preferable conduct, but the normal standard for government fiduciaries—were their actions in good faith and within the realm of their acceptable discretion, or were they arbitrary, capricious. . .". The Court's affirmance in *Mitchell II* persuasively refutes the Tribe's assertion that *Mitchell II* authorized it to disregard the "arbitrary and capricious" standard and to invalidate reasonable administrative actions.

The Tenth Circuit's definition of the trust duty to require maximization of royalty revenue, and its holding that concededly reasonable royalty administration, *see infra* Point II.A., breached trust duties, far exceed the standard of conduct demanded by this Court and the

Court of Claims.[14] There is no finding below that the Secretary was negligent or exhibited bad faith. The Secretary's acceptance of amounts realized by the lessee as value was both reasonable and in conformance with industry standards. J.App. 28a. Consequently, the decision below finding the Secretary breached his duty to the Tribe conflicts with the Claims Court's decision in *Navajo Tribe v. United States*, 9 Cl. Ct. 227, 245 (1985), which found that the Secretary, following industry practice, acted reasonably and did not breach trust duties even though the "highest possible financial return" was not achieved.[15] *See also American Indians Residing on the Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980, 993 (Ct. Cl. 1981), *cert. denied*, 456 U.S. 989 (1982). Certiorari should be granted to address the conflict between the decision below and decisions of this Court.

II. THE COURT OF APPEALS' INVALIDATION OF A REASONABLE AND LONG-STANDING ADMINISTRATIVE INTERPRETATION CONFLICTS WITH CANONS OF CONSTRUCTION PRESCRIBED BY THIS COURT.

The decision below set aside the Secretary's long-standing and reasonable interpretation of lease terms and

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[14] Differences between value the Secretary received for trust property and market value do not establish a breach of trust.

> Mere evidence of a disparity between the value that the trustee realized in disposing of trust property and the fair market value at the time of that disposition, as later independently appraised, is not sufficient to establish negligence or other breach on the part of the trustee.

Coast Indian Community v. United States, 550 F.2d 639, 653 (Ct. Cl. 1977); *see also Moose v. United States*, 674 F.2d 1277, 1284 (9th Cir. 1982) (mandamus would not lie to compel the Secretary, acting under a congressional directive "to best protect" Indian interests, to make "the most advantageous allowable investment.")

[15] Unlike the Court of Claims, the court below denies any relevance to "industry practices." *See* J.App. 43a.

regulations implementing the IMLA and other mineral leasing statutes.[16] The Secretary had determined, for nearly fifty years, that value of gas for royalty purposes should be determined by arms-length gas purchase contract price, and that "dual accounting" is not required of oil and gas lessees with no stake in gas processing plant revenues. If permitted to stand, the decision below threatens to compel lessees of Indian lands nationally to prepare and file each month elaborate accountings depicting the operating economics of a processing plant in which they own no interest, and from which they neither derive any revenue nor likely have any right to obtain processors' plant operation information needed to perform such accountings. Moreover, the decision below, holding that a concededly reasonable administrative interpretation may be set aside solely because a different interpretation might produce greater short-term tribal revenue, subjects oil and gas lessees of tribal lands to even greater uncertainty as to their rights and duties than that normally attendant to doing business with tribes.

The Secretary's interpretation was grounded in lease provisions and regulations expressly granting the Secretary discretion to adopt the interpretation set aside below. The interpretation is reasonable and gives effect to all applicable regulations and lease terms. The failure of the Court of Appeals to affirm this long-standing agency interpretation of regulations and lease terms conflicts with decisions of this Court that render such interpretations conclusive if they are reasonable. Certiorari should be granted to address this conflict.

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[16] *See, e.g.*, Mineral Leasing Act of 1920, 30 U.S.C. §§ 223-237 (1982); 30 U.S.C. §§ 351-359 (1982); 25 U.S.C. § 396 (1982); 25 U.S.C. § 398 (1982); 25 U.S.C. §§ 398a-398e (1982). *See* J. App. 238a.

A. The Decision Below Conflicts With this Court's Decisions Requiring Deference to Reasonable, Long-standing Interior Department Interpretations of Regulations.

The decision below conflicts with decisions of this Court that accord conclusive deference to reasonable, long-standing administrative interpretation of regulations. *See, e.g., Udall v. Tallman*, 380 U.S. 1, 4 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945). The court below invalidated the Secretary's uniform practice in administering oil and gas leases on tribal lands of accepting royalties accounted for and paid based on the amount realized by the lessee for unprocessed gas at the point of sale, and ordered the Secretary to require lessees to implement dual accounting. *See* A-513-17. If permitted to stand, the decision below threatens widespread disruption of Secretarial administration of tribal oil and gas leasing because the Secretary does not require dual accounting for oil and gas lessees of any tribe other than the Jicarilla Apache Tribe where such lessees or their affiliates do not own an interest in a gas processing plant. *Id.*

The administrative interpretation that amounts realized by the lessee under arms-length contracts reflects value for royalty is long-standing, uniform, and authoritative. In 1939, immediately after passage of the IMLA, the Secretary devised Lease Form 5-157, which authorizes the Secretary to deem "[t]he actual amount realized by the lessee . . . conclusive evidence of value." Lease ¶ 3(c). Thereafter, the Secretary promulgated regulations consistent with the lease form in 1942, 7 Feg. Reg. 4,132 (June 2, 1942), *now compiled as* 30 C.F.R. Part 206 (1985), and subsequently in 1957, 22 Fed. Reg. 10,588 (Dec. 24, 1957), *now compiled as* 25 C.F.R. Part 211 (1986). Significantly, the regulations carried forward the language of Lease Paragraph 3(c) quoted above. 25 C.F.R. § 211.13(a) (1986). In the early 1950's, the Secretary employed the Form 5-157

Lease in leasing to Southland's predecessor and continues to use it. Consistent with these provisions, the Secretary has accepted royalty based on the amount realized by the lessee, without requiring dual accounting from tribal, allotted, and federal lands, nationally, or from Jicarilla lessees, specifically. *See supra* at 6-7.

In 1976, in response to the Tribe's earlier demands, the Secretary completed a re-examination of royalty accounting on Jicarilla leases and, although dual accounting was required of Supron during the years it owned the Lybrook plant, declined to require dual accounting of Southland. *See supra* at 7. That decision was since affirmed by the IBLA on March 21, 1980,[17] again without imposing dual accounting requirements on Southland. *See Supron Energy Corp.*, 46 I.B.L.A. 181 (1980).

Since initiation of this action, the Secretary has continued this uniform practice, except as required by the decisions below. Effective July 1, 1977, Notice to Lessees ("NTL")-5, issued May 1, 1977 by the USGS, provided that value of gas for royalty purposes on substantially all federal and Indian lands shall be the price received under an arms-length sales contract and that royalty "will be computed on the volume and value of marketable production at the lease . . . boundary." *See* 42 Fed. Reg. 22,610-611 (May 4, 1977).[18] On January 3, 1986, the Secretary proposed to amend NTL-5 "to provide more flexibility in valuing for royalty purposes natural gas produced from onshore Federal and Indian leases." 51 Fed. Reg. 260 (January 3, 1986). The 1986

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[17] The District Court correctly acknowledged that it may have invaded the province of the administrative tribunal. J. App. 133a. Nevertheless, the IBLA decision preserved the discretion of the Secretary, as vested by applicable lease terms and regulations. *See* 46 I.B.L.A. at 193.

[18] In August 1977, the USGS without explanation or prior notice to Southland acceded to the demands of the Tribe to be excluded from the operation of NTL-5. 42 Fed. Reg. 40,263 (August 9, 1977).

proposed amendments will give greater, near-conclusive, weight to price received by the lessee.

Finally, the Secretary's recent draft proposed regulations governing the administration of oil and gas leases and royalty valuation seek to "clarify policy" that "[r]oyalty would be based on the price received by the lessee under its arm's length contract." J.App. 345a; *see* 51 Fed. Reg. 4,507-4,508 (February 5, 1986).[19] Thus, the Secretary's interpretation and royalty management policy permitted and continues to permit royalty value determination to be based on the arms-length price received at the wellhead by non-plant-owning lessees. This uniform interpretation is precisely the type of administrative action that this Court requires be accorded substantial or conclusive deference.

Because the long-standing administrative interpretation of the regulations promulgated under the IMLA is concededly a reasonable one, J. App. 48a, the Court of Appeals' substitution of its views for the interpretation of the Secretary conflicts with decisions of this Court. *See Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana*, 105 S. Ct. 2587, 2597 (1985); *Udall v. Tallman*, 380 U.S. 1, 4 (1965). The decision below disregards this Court's prescription that:

> [L]ongstanding, uniform construction by the agency charged with administration of the [Act], particularly when it involves a contemporaneous construction of the Act by the officials charged with the responsibility of setting its machinery in motion, is entitled to great respect.

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[19] The preamble to the proposed regulations also indicates that the proposals satisfy the Secretary's responsibility as trustee for the Indians, and that utilization of the same criteria for royalty valuation on federal and Indian leases is appropriate: "[V]alue is best determined by the interaction of competing market forces. Because the proposed valuation method would secure for the Indians . . . a fair and just return from oil and gas leasing activities, it obviates the need to treat Indian lands differently from Federal lands." J. App. 347a.

Chemehuevi Tribe of Indians v. F.P.C., 420 U.S. 395, 409-10 (1975). This canon of construction is even more compelling when construing an administrative regulation:

> [s]ince this involves an *interpretation of an administrative regulation* a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [*T*]*he ultimate criterion is the administrative interpretation, which becomes of controlling weight* unless it is plainly erroneous or inconsistent with the regulation.

Udall, 380 U.S. at 16-17, *quoting Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945) (emphasis supplied).[20]

This Court recently reaffirmed that a uniform, contemporaneous and long-standing interpretation of a statute by Executive officials, even in a manner contrary to the present position of an Indian tribe, " 'is entitled to very great respect.' " *Mountain States*, 105 S. Ct. at 2597, *quoting Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827). In *Mountain States*, this Court reversed the Tenth Circuit's affirmance of a District Court decision setting aside a BIA administrative interpretation, because Executive officials implementing the Pueblo Lands Act of 1924, 43 Stat. 636, "were far more likely to have had an understanding of the actual intent of Congress than judges who must consider the legal implication of the transaction over half a century after it occurred." 105 S. Ct. at 2598; *see also Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 660 (1976); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980). The Court of Appeals' failure to give controlling weight to the Secretary's concededly reasonable and long-standing interpretation of regulations govern-

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[20] The Court of Appeals recognized that "[t]he issue presented . . . is one of interpretation of regulations, and not whether the Secretary [acted properly] . . . in promulgating the regulations initially." J.App. 42a.

ing royalty calculation conflicts with decisions of this Court.

B. The Decision Below Conflicts with this Court's Decisions Favoring Interpretations that Give Effect to all Provisions of Applicable Law.

The interpretation of the court below cannot be harmonized with lease terms and regulations that grant the Secretary broad discretion to determine "value" for royalty purposes; consequently, it conflicts with this Court's decisions requiring statutes and regulations to be interpreted to give effect to all their provisions. *See, e.g., Mountain States*, 105 S. Ct. at 2595. The lease and regulations do not require "dual accounting" for lessees who sell gas at the wellhead and receive no profit from downstream gas processing. To the contrary, they authorize the Secretary to consider or deem conclusive one or more of several indicia of value, many of which cannot be considered under the interpretation below. In rejecting the Secretary's long-standing interpretation and holding that applicable lease terms and regulations require "dual accounting" by all lessees, the decision below rendered important portions of the regulations inoperative.[21] Certiorari should be granted to address the conflict between the decision below and decisions of this Court that mandate construction of statutes and regulations in a

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[21] The Secretary and the Department of the Interior have maintained consistently that the method of determining "value" for royalty accounting purposes is within the Secretary's discretion. *See, e.g.*, A-937; Brief for the Secretary of the Interior, 15, 17, 24-28, filed February, 1982, Court of Appeals for the Tenth Circuit; Application for Modification, 6, filed March 6, 1986; *see also* 51 Fed. Reg. 260-62 (January 3, 1986) (the Secretary has "broad authority granted by agency regulations . . . in valuing natural gas for royalty purposes in specific situations," *citing* 30 C.F.R. § 221.47 (1982)); *Amoco Production Co.*, 29 I.B.L.A. 234, 236-37 (1977); *Hoover & Bracken Energies, Inc.*, 52 I.B.L.A. 27, 33 (1981) ("It is well recognized that the Secretary of the Interior has considerable latitude in determining what is the 'value' of production . . .").

manner that gives effect to each part of the regulatory or statutory scheme.

The decision below renders inoperative regulations and lease terms that grant the Secretary discretion to determine "value" for royalty purposes. Both Paragraph 3(c) of the Lease and 25 C.F.R. § 171.13 (1981) provide that the "actual amount realized by the lessee from the sale of [hydrocarbon] products may, in the discretion of the Secretary of the Interior, be deemed . . . conclusive evidence of such value." The decision below cannot be reconciled with this provision because it precludes the Secretary from determining that "actual amount realized" is "conclusive evidence" of value for royalty purposes.

Similarly, the decision below renders partially inoperative 30 C.F.R. § 221.47 (1982), which provides that the highest price paid or offered for like quality products from the field or area where the leased lands are situated "will be considered to be a reasonable value" for royalty purposes "absent good reason to the contrary." [22] The decision below, however, precludes the Secretary from determining that the "highest price paid or offered . . . from the field" is a reasonable value. Rather, the Court of Appeals has mandated that the "net realization" value of hydrocarbon products after processing be computed and compared to the "BTU adjustment" value, and the higher of the two prescribed figures be considered the "value" of the product, regardless of the actual proceeds received by the lessee, the field price, or other "relevant matters." [23]

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[22] This provision was, in fact, applied to Jicarilla lessees, including Southland, and resulted in the Secretary's assessment of additional royalties. *See* 46 I.B.L.A. at 196.

[23] Under the decision below, the Secretary cannot consider several of the factors denominated in 30 C.F.R. § 221.47 (1982):

> The value of production, for the purpose of computing royalty, *shall* be the estimated reasonable value of the product as determined by the supervisor, *due consideration being given* to the

Finally, the Court of Appeals failed to harmonize its interpretation with 30 C.F.R. § 221.50 (1982), the only regulation that indicates which lessees will be required to pay royalties based on dual accounting.[24] The court below relied on 30 C.F.R. § 221.50(c) to support its conclusion that dual accounting must be required of all lessees, submitting that the regulation "does not by its terms require that the lessee itself extract liquids before the Secretary may utilize aggregate value computing; to the contrary, it appears to apply in *all* situations." [25] J.App. 47a (emphasis in original). However, 30 C.F.R. § 221.50(b) immediately precedes that section and provides that only if the lessee "derive[s] revenue on gas from two or more products . . ." will a royalty "normally . . . be collected on all such products . . .". The regulation thus indicates that such a royalty will *not* be collected from *some* lessees who receive revenue from liquid products and strongly suggests that no such royalty will be collected from lessees who do not. The Tenth Circuit's analysis would have § 221.50(c) strip § 221.50(b)

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highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the lessee, to posted prices and to other relevant matters. (Emphasis supplied).

[24] Paragraph 3(c) of the Lease and 25 C.F.R. § 171.13 (1981) include language allowing "dual accounting," but do not prescribe the lessees to whom such a requirement is applicable. The draft regulations presently under consideration by the Department of the Interior reflect the interpretation that only lessees with some interest in, or affiliation with, gas processing plants are required to dual account. J. App. 380a-381a.

[25] 30 C.F.R. §§ 221.50(b) and (c) (1982) provide:

(b) If the lessee derives revenue on gas from two or more products, a royalty normally will be collected on all such products.

(c) [F]or the purpose of computing royalty the value of wet gas shall be either the gross proceeds accruing to the lessee from the sale thereof or the aggregate value determined by the Secretary of all commodities, including residue gas, obtained therefrom, whichever is greater.

of any meaning, because not only would *all* lessees who derive royalty from liquids be required to provide dual accountings, but even the lessee that does not derive "revenue on gas from two or more products" also would be subject to the requirement. To give effect to all provisions of the regulation, 30 C.F.R. § 221.50(c) should be read as providing the manner in which dual accounting is to be administered, where the Secretary determines it to be applicable considering the guidance of 30 C.F.R. § 221.50(b).

Thus, substantial portions of the lease terms and regulations governing royalty calculations, including terms expressly vesting discretion in the Secretary, are rendered meaningless by the decision below.[26] The decision below, therefore, conflicts in principle with decisions of the Court that construe statutes and regulations "so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *see also Mountain States*, 105 S. Ct. at 2595; *Jay v. Boyd*, 351 U.S. 345, 360-61 (1956).[27] Because the interpretation below affects many thousands of tribal and allotted oil and gas leases, certiorari should be granted to correct this error.

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[26] In essence, a determination committed to the Secretary's discretion has been converted to an act mandatory in nature. The decision below erred in granting relief in the nature of mandamus. Decisions of this Court preclude relief in the nature of mandamus unless there is a "clear and indisputable" right to the relief sought, and "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable'." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980), *quoting Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953).

[27] The en banc majority below suggested that "practical considerations" support its decision, J.App. 47a, referring without record support and contrary to the District Court's findings that, through "sweetheart deal[s]," lessees could bilk the Tribe out of royalty payments. J.App. 48a. However, the decision below ignores real and substantial practical difficulties its decision imposes upon non-plant-owning lessees. *See supra* at 5.

III. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT THAT HOLD THE TRUSTEE, NOT INNOCENT THIRD PARTIES, LIABLE FOR BREACHES OF TRUST.

Disregarding the unambiguous statements of this Court in *Mitchell II*, the decision below, imposing liability upon lessees acting in reasonable reliance upon the Secretary's administration of oil and gas leases, conflicts with *Mitchell II*, *Nevada v. United States*, 463 U.S. 110, 145 (1983), and *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). In *Mitchell II*, this Court stated:

> Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. *See* Restatement (Second) of Trusts §§ 205-212 (1959); G. Bogert, Law of Trusts and Trustees § 862 (2d ed. 1965); 3 A. Scott, Law of Trusts § 295 (3d ed. 1967).

463 U.S. at 226-27. In stark contrast, the decision below imposes liability against innocent lessees, acting in reasonable reliance upon the conduct of the Secretary.[28] Upholding imposition of liability for money damages against Southland, and not the Secretary, would not "deter federal officials from violating their trust duties." *Id.*[29]

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[28] The District Court correctly found that any failure to account for and pay royalties it thought were owed by Southland and other lessees resulted from "no apparent fault of their own." J.App. 127a.

[29] The Tribe has filed an action for money damages under the Tucker Act, 28 U.S.C. § 1491 (1982), the statute involved in *Mitchell II*, against the Secretary in the United States Claims Court, arising out of the same claims raised by the Tribe in this action. *See* J.App. 41a n.3. That action has been stayed pending the outcome of this suit. Unless the Tribe is to recover twice, affirming the damages award in this action likely would foreclose the imposition of damages against the Secretary that *Mitchell II* holds are congressionally intended.

Common law trust principles, relied upon by this Court in *Mitchell II*, 463 U.S. at 226, support that innocent third parties should not be held accountable for a trustee's breach of fiduciary obligations. *See* Restatement (Second) of Trusts § 326 (1959) (third parties liable to a beneficiary only if they have notice of a breach of trust and participate in it); *see also* A. Scott, *The Law of Trusts* §§ 321, 326, 326.1, 326.6 (2d ed. 1956); *International State Bank v. Bray*, 87 N.M. 350, 352, 533 P.2d 583, 585 (1975); *Voss Oil Co. v. Voss*, 367 P.2d 977, 980 (Wyo. 1962). While it is appropriate to impose liability upon third parties who actively participate in a breach of trust,

> [i]t is quite a different matter . . . to compel [third parties] to supervise the conduct of the fiduciary and to hold them liable for failure to do so. A rule imposing such liability upon [third parties] makes it dangerous to deal with a fiduciary and seriously interferes with the proper performance by the fiduciary of his duties.

A. Scott, *The Law of Trusts* at § 326.6 (2d ed. 1956). Should the decision below be upheld, oil and gas leasing on tribal lands may be affected detrimentally because potential oil and gas lessees necessarily will consider potential liability for Secretarial breaches of fiduciary obligations before investing in oil and gas development on Indian lands. Because the decision below conflicts with the principles announced in *Mitchell II*, other decisions of this Court, and settled principles of trust law, and raises important questions respecting the administration of Indian lands, certiorari should be granted.

CONCLUSION

For the foregoing reasons, Petitioner Southland Royalty Company respectfully prays that a Writ of Certiorari issue to review the *en banc* judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

JOHN R. COONEY
(Counsel of Record)
LYNN H. SLADE
WALTER E. STERN III
MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.
Post Office Box 2168
Suite 1000, Sunwest Building
500 Fourth Street, NW
Albuquerque, New Mexico 87103
(505) 848-1800
Attorneys for Petitioner
Southland Royalty Company